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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/641,410	08/18/2000	Alice Mary O'Donnell-Kiely		7256

7590

10/07/2005

Alice O Kiely
71 Stonewall Court
Yorktown Heights, NY 10598-1819

EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 10/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/641,410

Applicant(s)

O'DONNELL-KIELY, ALICE MARY

Examiner

Robert Madsen

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 April 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 179-198 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 179-198 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on April 11, 2005 has been entered. Claims 179-198 remain pending in the application.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claim 187 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The independent claim 179 is directed to a supported frozen comestible comprising a frozen comestible and a composite candy support. The specification does not describe how a supported comestible *includes* a means for manufacturing, means for providing ingredients in a plurality of directions, means for providing a plurality of differing ingredients, means for monitoring the amount of ingredients, or means for providing

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protective packaging. For examination purpose the claim will be understood to mean "further including a means for inhibiting the breakage of said composite comprising a chewy candy member in contact with a nougat, ingredients running in a plurality of directions, specific combination of multilayer ingredients, plurality of differing ingredients running..., a suitable size and shape, a mess guard with wrapping, or protective packaging." (i.e. similar to the recitation of claim 191).

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 181,184,185,188,189-194 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

6. Regarding claim 181, the claim includes the limitation "the other of said two discernable edible members". There is insufficient antecedent basis for this limitation in the claim since the claim from which it depends (e.g. claim 179) recites two discernable edible members and there is no reference to one member. For examination purpose this claim will be understood to mean "one of said two discernable edible members". Additionally, the claim recites "a non substantial amount of rice or grain" The term "non-substantial amount" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. For examination purposes

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this amount is understood to mean the rice or grain may be present, but the member is not entirely rice or grain.

7. Regarding claim 184, the claim recites "wherein said plurality of members comprises candy, wherein said plurality of members comprises chewing gum". The claim is indefinite because it is not clear if the plurality of members includes *both* candy and gum or *either* candy or gum. For examination purposes the claim is understood to mean the plurality of members includes candy or gum.

8. Regarding claim 185, the claim recites "wherein said lollipop comprises candy, wherein said lollipop comprises chewing gum, wherein said lollipop comprises a cookie". The claim is indefinite because it is not clear if the lollipop comprise candy, gum, and a cookie or one of the three. For examination purposes the claim is understood to mean the lollipop comprises candy, chewing gum, or a cookie.

9. Regarding claim 187, a broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte*

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Steigewald, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 187 recites the broad recitation "means for providing a plurality of differing ingredients running concentrically, parallel, or maneuvered within said composite candy support", and the claim also recites "including twisted within said composite candy support" which is the narrower statement of the range/limitation.

10. Regarding claims 188 and 194, the claims recite "wherein said protective mess guard comprises a non edible mess guard, wherein said protective mess guard comprises an edible mess guard". The claims are indefinite because it is not clear if the mess guard includes *both* an edible and non-edible portion or if the mess guard includes *either* an edible or non-edible portion. For examination purposes the claims are understood to mean the mess guard comprises an edible or non-edible portion.

11. Regarding claims 189-194, Claim 189 recites "a non substantial amount of rice or grain". The term "non-substantial amount" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. For examination purposes this amount is understood to mean the rice or grain may be present, but the member is not entirely rice or grain.

Claim Rejections - 35 USC § 102

12. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

13. Claims 179-182, 184-187, 189-198 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

14. Musher teaches ice cream on an edible support having at least two discernable edible members wherein one portion extends into the ice cream and one portion extends out of the ice cream for holding. Musher teaches stick, which may be completely edible (Page 5, Column 2, lines 46-56). The end of the stick may include a lollipop that is also connected structure pieces (Page 5, Column 1, lines 54-65), which may include items such as nuts or even a plurality of candy pieces (Page 3, Column 2, lines 14-21 and Page 5, Column 2, lines 24-35), and the lollipop and structure pieces may be coated in hard fat, which would prevent the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 5, Column 1, lines 65-Column 2, line 2). Musher further teaches the structure pieces around the lollipop, which include candy, can be placed concentrically (i.e. a circle around the lollipop) to improve support, or maneuvered in some other manner on the support (Page 5, Column 1, lines 45-54 and Column 2, lines 24-35). Furthermore, Musher teaches a plurality of voids in the overall structure (i.e. note the spaces in Figure 6 between the structure pieces and lollipop).

(Also See Page 6, Column 1, lines 4-70, Page 2, Column 2, line 64 to Page 3, Column 1, line 60 and Figures).

Claim Rejections - 35 USC § 103

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. Claims 188 and 194 are rejected under 35 U.S.C. 103(a) as being unpatentable over Musher (US 2217700) as applied to claims 179-182, 184-187, 189-198 above, further in view of Berg (US 3459296)

17. Musher is silent in teaching a protective inedible mess guard on the edible support. Berg teaches an inedible mess guard to avoid a messy mass during consumption of frozen confections on support members and catching drippings, and this would provide a better grip since if the mess guard would not have drippings at the point where the consumer holds it (Column 1, lines 10-45, figures). Therefore, it would have been obvious to modify Musher and include an inedible mess guard since Berg teaches this will help to avoid a messy mass during the consumption of frozen confections on support members.

18. Claims 183 are rejected under 35 U.S.C. 103(a) as being unpatentable over Musher (US 2217700) as applied to claims 179-182, 184-187, 189-198 above, further in view of Hammond (US 2622784).

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19. Musher teaches ice cream on a support, but is silent in teaching the ice cream a second portion includes a plurality of handles for holding with two hands.

20. Hammond teach ice cream on a support wherein the carton used to ship the ice cream is serves as the mold and the ice cream block includes a multitude of sticks.

Hammond teaches this is an improvement over the prior art in that the entire mold block can be immediately shipped to the retailer and considerable handling of the product prior to sale can be avoided, such as the re-heating of the product to remove it from the mold (Column 1, line 1 to Column 2, line 40, Figure 1). Therefore, it would have been obvious to include a plurality of supports in the ice cream of Musher since Hammond teaches a molding method that forms a plurality of supports in ice cream allows one to ship ice cream on a supports to a retailer immediately after freezing and avoid considerable handling of the product prior to sale. It would have been obvious to further include a second portion with a plurality of handles since this would have required fewer total number of supports to insert for the same number of handles and would have simplified the manufacturing process.

Conclusion

21. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 8:00AM-4:30PM M-F.

22. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.


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23. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
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